

Draft Submission to Royal Commission  
on Civil Liability and Compensation  
for Personal Injury

Category (c) of the Terms of Reference

A. Introduction

The members of the Royal Commission will be aware that the medical authorities are of the opinion that the smoking of tobacco products, and in particular cigarettes, can be harmful to the smoker's health in a number of ways. H.M. Government endorses the views of the medical authorities.

The tobacco manufacturers do not consider that they are qualified to make judgments on the question of the health aspects of smoking, this being a matter for the medical authorities.

The tobacco manufacturers have co-operated fully with H.M. Government in printing a health warning on all cigarette packs, in the production and publication of the Tar and Nicotine Table compiled by the Government Chemist, and generally in publicising the views of the medical authorities that cigarette smoking can damage one's health.

The tobacco manufacturers are of the opinion that the public at large are well aware of the views of the medical authorities and that those who choose to smoke do so in full knowledge of the possible effects on their health and accept that it may be impaired.

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The view taken by the medical authorities regarding the effects on health of smoking tobacco has stimulated research, both within the tobacco industry and outside, into the development of substitutes for natural tobacco.

The objective with these substitutes is to produce an alternative to natural tobacco that will have the characteristics of natural tobacco in terms of smokability and satisfaction for the smoker, whilst at the same time minimising the incidence of those constituents of natural tobacco smoke considered by the medical authorities to be harmful.

H.M. Government has actively encouraged the development of tobacco substitutes by way of legislation facilitating their development. If substitutes are successfully introduced there may well be a significant reduction in the purchases of natural tobacco to the benefit of the United Kingdom balance of trade.

The smoking of tobacco products creates a somewhat unusual situation in that it gives a great deal of pleasure and comfort to very many people, and in the latter context could be regarded as beneficial, and is yet at the same time considered to be the source of danger to health in a number of different ways by the medical authorities.

Legislation which affects tobacco is as much an aspect of social policy as anything else because of the unique circumstances which surround the smoking of tobacco products.

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B. The Volenti Non Fit Injuria Defence

Whether the law remains as it is or is amended in some way, the defence of 'volenti non fit injuria' should remain part of the law. It is in principle wrong that anyone who is fully aware of a potential risk and voluntarily accepts that risk should, in the event of suffering injury thereby, be able to exact compensation from some other person who can be shown to be in some way responsible for the risk producing event or thing. This principle is of general application and is not only relevant to damage to health alleged to have been caused by smoking tobacco products.

As far as tobacco products are concerned, and accepting the view of the medical authorities that smoking may damage one's health, the withdrawal of the defence of volenti non fit injuria would place the tobacco manufacturers in an impossible position.

The medical authorities are of the opinion that smoking can damage one's health in various ways, but each of these has one thing in common; the damage is cumulative and not the result of an isolated incident. Accordingly, if the volenti non fit injuria defence were no longer available, or indeed if the law were changed in other ways to create liability where at present it is considered none exists, the task of establishing what could be attributable to events prior to the change of law and what could be attributed to events after the change of law would be incapable of solution on any equitable basis.

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Quite apart from the practical difficulty of creating a liability where none existed before, where the damage alleged to have been caused is essentially the result of an accumulation of events the question of compensation presents almost insuperable problems.

Again, if the view of the medical authorities is accepted that smoking damages one's health in a number of ways, a view accepted by H.M. Government, to make tobacco manufacturers liable for such damage would saddle them with a liability which in all probability they would have no hope of satisfying. Insurance, whether compulsory or voluntary, would be no answer as an insurance company would obviously demand a premium that would be more than sufficient to meet expected claims.

Any system of no-fault liability, whether or not backed by compulsory insurance, would be quite impracticable so far as tobacco is concerned.

C. Tobacco Substitutes

As the law stands at present, liability rests upon proof of negligence. The duty of the manufacturer may be described in the following terms:-

"To take all reasonable steps, in the light of the best knowledge that ought reasonably to be available to them, to protect the consuming public from injury."

As mentioned in A. above, the tobacco industry and others have, for some years, been seeking to develop substitut-

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ultimately  
for natural tobacco minimising, and possibly/free of, those  
constituents of natural tobacco considered by the health  
authorities to be harmful.

The tobacco industry is not only fully conscious  
of its responsibility under the law in relation to the  
development of substitutes for natural tobacco, but also  
of the lessons to be learnt from the tragic thalidomide  
affair.

The tobacco industry considers it to be in the  
general interest to pursue their researches into substitutes  
for natural tobacco. Neither the enhanced duty of care that  
is likely to be required as a result of the thalidomide affair  
nor the nature of the pressure brought to bear on the manufacturers  
of thalidomide are regarded as a sufficient disincentive to  
deflect the tobacco industry from pursuing their researches  
into substitute materials and ultimately marketing them  
(assuming that none of the tests indicate the possibility  
of any new danger being associated with them) with a view to  
providing the smoking public with an alternative to natural  
tobacco the use of which the medical authorities would consider  
to be likely to lead to a decrease in the incidence of diseases  
associated with smoking.

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If, however, the law were to change such that it were  
based on no fault liability or on a system of strict liability,  
offering little or no prospect of the manufacturer escaping  
liability for damage to health allegedly caused by the tobacco

substitute that was entirely unforeseen, and could not with the exercise of all due care have been foreseen, there would be little point in the tobacco industry pursuing their researches into substitutes for tobacco.

There never can be a 100% guarantee of the safety of any product consumed by the human be it food, drink or tobacco. This is more so when the effect could be cumulative in nature. There will always be a residual area of risk. Indeed, there can be no 100% guarantee that the air we breathe will not damage health to some degree.

#### D. Ante-Natal Injury

It has been suggested recently that a mother who smokes during pregnancy may thereby run the risk of her child being adversely affected in some way. Such a proposition is not capable of proof in an individual case and the interplay of genetic and other factors, such as diet and the general health of the pregnant mother, are such that even if the proposition were to be accepted in general terms, there would be a problem of assessment that would only be capable of solution in an arbitrary fashion.

If a pregnant mother chooses to smoke, be it natural tobacco, a substitute, or a mixture of both, in the full knowledge that by so doing it may adversely affect her unborn child, it is hardly equitable that the manufacturer should be fixed with a potential liability for what is, in effect, a deliberate act of the mother against her own unborn child.

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The remarks concerning tobacco substitutes and no-fault liability in paragraph C. above are equally applicable in the case of ante-natal injury.

E. General

The effect of smoking and health is an emotive one and it is not at all easy for the tobacco industry to present any case touching on the subject without laying themselves open to all manner of criticism. In the present case it is easy to make the charge of 'special pleading' and raise queries as to why the tobacco industry should be an exception.

This paper is, of course, not arguing for special treatment for tobacco. Some of the points made, e.g. the argument for the retention of the 'volenti non fit injuria' defence, are of general application and others have application in relation to other products.

The fact is that any product consumed by the human being will, if taken to excess, adversely affect health, be it food, drink or tobacco.

This paper outlines some of the problems that the tobacco industry would face if the basis of liability were to be altered in certain ways. At worst, a system of no fault liability could make it virtually impossible for the industry to operate at all with all the consequences for (inter alia) employment and the revenue that would flow from such a state of affairs.

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Unless there are overwhelming reasons for altering the basis of liability for personal injury, the law should not be changed. The law on this subject has developed over the years to take account of changing circumstances and social attitudes without the need for any significant statutory interference. If allowed to do so, the law will no doubt continue to develop in this manner.

The present law, quite rightly, requires a high degree of care to be exercised in the manufacture of goods if the manufacturer is to discharge the duty of care owed by him to the consumer or user of those goods. It is considered that the present law has the benefit of being both fair and certain. A change in the basis of liability, particularly to a system of no-fault liability, might well inhibit manufacturers from pursuing technological advance that in general terms might be considered socially desirable, or, depending upon the nature of the change in law, such projects might be delayed whilst a body of new case law be developed to put flesh on the statutory skeleton. Such considerations as these are not, of course, peculiar to the tobacco industry.

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